"AGENCY BY ESTOPPEL."

The issue between Professor Cook and the Estoppel-sinners (of whom, for the moment, I appear to be the most notorious) is stated as follows:[1]

> "The liability of a principal for all contracts entered into on his behalf by an agent acting within his apparent or ostensible (but beyond his real) authority is universally recognized."

But, whereas the sinners base the liability upon estoppel, the Professor contends that

> "The principal is bound because, according to all sound principles, he has entered into a contract with the third party . . . The liability in question is a true contractual liability."

In cases of this class it seems to be clear enough that the principal did not himself make the contract; that he did not authorize anyone to make it; and that (sometimes) it was made in absolute violation of his clearly expressed will. It appears to be equally clear that the agent did not make the contract for him; and that he could not; for he had no authority to do so; he may, indeed, have been expressly inhibited from that very act. If, then, we have here "a true contractual liability," it is one of such peculiar sort that it is based upon something which the principal did not do; and which no one having his authority did; but upon something which may have been done in actual contravention of his will.

The sinners recognize the situation: They see that one of the requisites of a contract is missing—namely, the authority of the agent to make it, and, when the principal so pleads, they say to him: "You represented to the man that your agent had authority to make that contract; upon the faith of such representation the man changed his position; and you cannot now deny that your assertion was true. You are quite correct in affirming that your agent had no authority to make the contract. We do not at all agree with Prof. Cook that he had—for the fact is otherwise. We merely say that having asserted that he had, and

[1] 5 Columbia Law Review 36.

the purchaser having acted upon that assertion, you are bound by your assertion, and *so* bound by the contract." It is a very simple case of estoppel by misrepresentation, of which there are hundreds of others.

The Professor, however, has a good deal more to say for himself than that. He propounds what he calls "the principle of manifested intention," expressing it in these words :

> "It is fundamental in the law of contracts that a person is bound, not by his real but by his manifested intention, *i. e.*, by his intention as manifested to the other party."

Now according to my library that proposition is not only not a fundamental principle, but it is not a principle of any kind. It is not even a comprehendible assertion. And so far from its coming into competition with estoppel or anything else, it cannot stand up squarely on its legs to be look at.

My notion is that it is fairly fundamental in the law of contracts that a man is not bound by intentions of any sort —real or spurious intentions, manifested or concealed intentions, good, bad, or indifferent intentions. Frequent visitations at a lady's house may induce a very proper question as to the nature of the gentleman's intentions; but even if he replied (to the lady herself) that he intended some day to marry her, he would not (because of that very clear manifestation of his intention) be liable in breach of promise. A pleading which alleged "that the defendant intended to marry the plaintiff, and that he refused to do so," would, or ought to be, very much ashamed of itself. And it would only be indicative of a curious glint of perverted genius if any one thought that the barren thing would look better if dressed up into an allegation "that although the defendant's real intention always was not to marry the plaintiff, yet on various occasions he manifested an intention to marry her, but finally refused to do so, wherefore the plaintiff claims $20,000." If I were the judge and had a free hand, that pleader would pay those damages or, in default, be shot.

If you tell me that under certain circumstances a declaration of intention to marry may be construed into an offer of marriage and consequently one part of a contract to marry, I shall agree. But even for such a case I could

not be induced to say that a man was bound by his manifested intention. Using more familiar and I think better language, I would assert merely that a man was bound by his contracts. Suppose for example that a man were to say to a woman that he desired to marry her, and that under the circumstances his language was construed into an offer of marriage, I would not say that he was bound because of his manifested desires; but that he was bound by his contract.

So much for the legal aspect of "the principle of manifested intention" and now, as mere English, what does it mean? Can a man have two contradictory intentions upon one subject and at one time? He may no doubt change his mind with great rapidity, but can a man at one and the same instant intend both to marry the girl and not to marry her? Probably not. Very well, would it enable him to have two contradictory intentions to make use of different adjectives, and to say that he had a good intention and a bad intention—meaning that he had intentions of two sorts upon one point, at one time? Evidently not. Then we cannot say that a man had a real intention and a manifested intention—if by that we mean that he had two different intentions upon one point, at one time.

Therefore, if a man has at any given period a real intention and a manifested intention, and if they cannot be different, they must be the same. So our "principle of manifested intention" might as well be called a "principle of real intention"; and it would then be clearly of no possible use as fundamental or otherwise, either in the law of contracts or elsewhere. An expressed or manifested intention is, I suppose, one that I did not keep to myself.

Prof. Cook has been wanting to intervene while this poor sinner has been talking, and now he says, "Be fair, Mr. Ewart, I did not say that a man was bound by his intentions alone; but that 'in the law of contracts', and as between real and manifested intentions, the latter were the important ones." In reply, I reiterate: (1) Intentions are intentions and nothing but intentions; (2) a manifested intention is an intention (a real intention) made manifest; (3) in the law of contracts a man is not bound by intentions

of any sort but only by contract; (4) if you have his contract you need not trouble about his intentions; (5) if you have not his contract, his intentions will not help you; (6) one of his intentions is *nil*, and he never had enough of them to multiply it by and so make anything out of it; (7) if the "principle of manifested intentions" is that when intentions and the surrounding circumstances can be construed into a contract, the man is bound by that contract (I think that is what is confusing the Professor), it would have been better to have said that a man is bound by his contracts than to declare that "a person is bound not by his real, but by his manifested intention."

Although there can be no contradiction between an intention and its manifestation, it is common enough for a man to misrepresent his intention; for example, he may affirm that it is his intention to marry a lady when such is really not his intention. This, I have no doubt, is what Prof. Cook has in mind when he speaks of "manifested intention." But it is necessary, in a discussion of this sort, that one should speak accurately. It reveals, in this case, that we shall do better by adhering to the old language, and that there is no light to be gained by substituting "manifestation" for "misrepresentation."

With this amendment, let us see what becomes of the proposed principle. It will read:

> "In the law of contracts a person is bound, not by his real intention, but by his assertions (his misrepresentations) as to his real intention."

Well, that will not do either. It is not quite so imposing as prior to amendment. And it is fatally wrong in alleging that a man can be bound by intention. What possible difference can it make to you whether or not I tell you the truth as to my intentions? Whatever they are, I am at perfect liberty to change them the next moment. If I misrepresent a fact to you, and you act upon my statement, I have done you an injury; but if I tell you that I intend to buy your property or that I don't, although I may have committed falsehood as to my intentions, you are not hurt, for you knew of my freedom to change my mind at any moment.[1]

[1] May I refer to my own book on Estoppel (p. 68) for the authorities there collected?

Perhaps, however, we shall get light by following Prof. Cook into the larger statement of his principle, and into a concrete application of it. The case given is this: A horse owner says to an intending purchaser, "X is authorized to sell to you my horse upon terms to be agreed upon between you." That statement is not true. On the contrary, X's authority is not to sell for less than $150. Nevertheless X agrees to sell for $100. The owner is bound; and the Professor's argument is as follows:

> "When . . . one has represented to another person . . . that a certain person is his agent vested with certain authority, he has manifested to such other person . . . his intention to be bound by the acts of the agent within the scope of the authority thus represented to exist.
>
> "Therefore, when the person to whom this manifestation of the intention has been made has acted upon it by coming to an agreement with the agent acting within his apparent authority, the principal is bound, *because a contract has been entered into* between himself and a third party."

Now, the first and most obvious objection to all this lies in the difference between a fact and an intention. What the owner did was to misrepresent a fact; that a certain person had certain authority. Prof. Cook argues that that is equivalent to a manifestation of an intention to be bound by what the agent may do. I should say that that is the very thing that, under the circumstances, it was not. It is a misrepresentation, and clearly not a manifestation of the owner's intention; and fog comes with misused words. But, whether or no, suppose that I do represent, or manifest, or indicate, or swear, truthfully or untruthfully, that I intend to be bound by what X does, may not I change my mind and say that I will not? The Professor will reply, "Certainly you may, until your intentions have been acted upon; but not afterwards." Very well, let us draw another statement of claim: "Although the defendant's real intention was not to marry the plaintiff, yet on various occasions he manifested an intention to marry her, and the plaintiff acted upon such manifestation by purchasing a most expensive trousseau, yet the defendant refused to marry the plaintiff, and the plaintiff claims $20,000." There should be death penalty for that too, I think.

Of course, if I misrepresent a fact, and upon the faith of my representation some one changes his position, I am estopped to deny the truth of my representation. But if I

manifest or misrepresent my intention, no one ought to depend upon my adherence to either the intention that I had, or to that which untruthfully I said I had. At best, it is a real intention; at worst, it was only a pretended intention; and is it affirmed that while I am at perfect liberty to alter my real intentions, I am bound to stick to those that I say I have?

I do not deny (and I am now coming to the point which has misled the Professor) that ingenuity may take the language of the concrete case and argue that it amounts to some kind of an offer; that that offer has been accepted; and that therefore there has been a contract. If so, the case is not such an one as we have been taking it to be. It is of no use to us; for there is no agency in it, of any kind; and we shall have to get another which is not amenable to such adept manipulation.

See what can be made out of the simple statement, "X is authorized to sell to you my horse upon terms to be agreed upon between you." In the first place, as we have seen, it is said to be equivalent to a manifestation of an intention to be bound by what X does. Secondly, it "is nothing more nor less than an offer to contract with him, leaving the terms to be fixed by X." Thirdly, "in other words he in effect says 'I will be bound by whatever terms of sale you and X may agree upon.'" This being settled, the Professor argues that:

> "When therefore X offers to the intending purchaser the horse for $100, in law the owner has offered the horse to B for $100, and when the intending purchaser accepts, the contract is complete. How could any other result be reached without ignoring the fundamental principles of our whole legal system?"

Probably the owner would be very much surprised to be told that he had really said all these unusual things; but let that go, and let us see what they amount to.

The first interpretation changing the misrepresentation as to agency into a manifestation of an intention has already been dealt with.

The second paraphrase changes this manifestation of intention into "an offer to contract, leaving the terms to be fixed by X"—that is to say, an offer to sell upon terms to be fixed by a third party. Very well, if that is what the

remark means, we have got a very common sort of an offer; and if the intending purchaser chooses to accept it, we have a very good contract; and there is no room either for "the principle of manifested intention" or of estoppel, or the law of agency, or of any argumentation, so far as I can see. But (following the Professor's assumption) the owner's offer is not accepted, so we may drop it from consideration. Instead of accepting the offer to sell at a price to be fixed by X, the intending purchaser gets a new and a very different sort of an offer from X (who had no authority to make such an offer, and who under the owner's offer was not to act as agent at all but merely as one who would fix the price at which the owner was to sell and the other to buy)—an offer to sell for $100. This unauthorized offer the intending purchaser accepts, and so, according to "the fundamental principles of our whole legal system," the contract is complete. The fundamental principles are not, I think, quite as bad as that.

The third gloss upon the simple misrepresentation of agency is, "I will be bound by whatever terms of sale you and X may agree upon." That may possibly be a mere expression of intention to be bound, but we have had that already; and we have had an offer; so let us call this (for the sake of seeing how many varieties of things the chap could have meant) a promise—"I promise you that I will be bound," &c. Very well, now there was either consideration for that promise or there was not. If there was, then we have a contract; but if so, Prof. Cook and I have nothing to do with the case, for agency is not involved in it, nor the extent of authority, nor misrepresentation of it, nor manifested intention. On the other hand, if there was no consideration for the promise, we need not discuss it any further.

I quite admit that if misrepresentation of X's authority means a contract to be bound by what X does, then a contract exists, and that estoppel is excluded. So, also, however, is "the principle of manifested intention" excluded; and so also is the law of agency, for it is no part of such a case that X is an agent of any kind. He might be a Laplander whose name had been heard of by both parties for the first time.

Prof. Cook sees one rather startling difficulty in the practical working of "the principle of manifested intention," namely, that it results in "a true contractual liability;" although there has never been a true contract; that is to say, there has never been a meeting of the minds of the parties. So far from agreeing to sell the horse for $100, the owner had expressly forbidden the agent to sell for less than $150; the owner never agreed or intended to agree to sell for $100; and yet there is "a true contractual liability." The Professor sees this difficulty clearly enough, and has recourse to the old expedient of changing the facts in order to make them fit his law. Referring to the objection that "there has been no meeting of the minds," he says, "to be sure there has not in fact; I contend there has been in law." There you are. The fact is one thing, and the law declares that it shall be another thing. How delightfully easy mathematics would be, if we could always eliminate the only difficulty in the problem. Eternity, to be sure, as a matter of fact, is bothersome to our finite intelligence; but why not say that, as a matter of law, it means merely time beyond which the memory of man runneth not to the contrary, and then look round for fitting applause. If, in the case in question, the owner, as a witness, swears that he did not assent to the sale, I suppose he ought to be convicted of perjury, upon the ground that the law says that he did, and that he, like everybody else, knew that according to law he was lying.

I confess to very little patience with this practice of making facts fit the law. I most heartily protest against every principle, fundamental or otherwise, which refuses to adjust itself to the truth. Language such as that just quoted is made use of (as were the more flagitious fictions of former times) to help people over mental difficulties. It is often observed in the declaration that such and such shall be deemed to be the fact, when everybody knows that it is not. The recent German codifiers ignore estoppel; and to arrive at conclusions easily reached through its principles, they repeatedly declare that one thing shall be deemed to be something else. It is time that they were doing better work than that.

The Professor endeavors to minimize the paradox (a

true contractual liability, although no true contract) by mentioning two cases in which he says that, by the help of manifested intention, a contract is made although there is no assent to it.

An offer by mail is accepted after a telegram withdrawing the offer has been sent, but before its reception; there was no mental assent; and there is a contract owing to the principle of manifested intention. There is a contract here, no doubt, but intention (manifested or otherwise) has nothing to do with it. Suppose that with the offer goes this P. S. (expressive of the real meaning): "This offer (without writing of further letters) I keep repeating to you until a reasonable time for its acceptance elapses, or until you receive from me a notification of its withdrawal;" and that prior to either period the offer is accepted. Have the minds not met, even although the offerer may have endeavored meanwhile to withdraw his letter? At the very moment of the offer being made it was accepted. Suppose the two men in presence of one another; and one says, I offer you so and so; and the other says, I accept it; there is a contract irrespective of "the principle of manifested intention"; and the result is not different if the same thing is done by letters.

The second "illustration of the principle of manifested intention is found in the law of marriage."

"A intending to lead B to believe that she is entering into a marriage with him, but with no intention of binding himself, represents to her that C is a clergyman duly authorized by law to perform marriage ceremonies. A and B go through a marriage ceremony before C, B acting in good faith throughout. C in fact is only a layman and without authority in the matter. Is there a valid marriage? In a jurisdiction in which common-law marriages are valid, yes. Why? Because A is estopped to deny that C was a clergyman? Not at all; he has manifested his intention to B to take her as his wife; she has manifested her intention to him to take him as her husband, and the marriage is complete. The fact that A did not intend to bind himself is immaterial."

Well, that is our marriage case over again. Let us omit the ceremony (as it seems to be important only as a manifestation of intention) and substitute a perfectly plain verbal declaration of reciprocal intentions to marry one another, is there in such a case a contractual marriage? Of course not, for intentions—real, manifested or even mutually manifested, are not a contract. Intentions, here,

are of no more importance than elsewhere; and the easy solution of the case is this: If by the *lex loci* marriage is good by mere contract, then the language of the ceremony would almost certainly amount to a contract; if it did not, two train loads of male and female intentions would not help anybody. If by the *lex loci* the marriage is void without ecclesiastical intervention, then it is void and the trains are still useless; but for certain purposes the man might be estopped from so saying. And if by the *lex loci* the marriage was not void but voidable by the woman (for the same reason that other contracts induced by fraud are voidable) then, trains or no trains, she would have a right to elect when she discovered the deception. Manifested intention has no more to do with the case than the cut of the gentleman's clothes.

Having, as he thinks, with the help of these two illustrations, relieved his principle from the difficulty just dealt with, Prof. Cook presents a problem to the sinners: Take, he says, a purely executory contract made by an agent without sufficient authority, and how are you going to bind the principal by your doctrines? Estoppel requires that the estoppel-asserter must have changed his position upon the faith of the misrepresentation of authority, and here he has done nothing—well, that is to say, he has done nothing but sign something. Just so; he's done nothing, except that he has done something. Has he not come into relations with the agent? If he has not changed his position, where or how did he get a cause of action against the agent for wrongful assertion of authority? Is not his new position this: that he has a right to get the horse for the $100, or to sue for the loss of his bargain. What more could he do, had the agent had the alleged authority?—sue, in one case, the agent, and, in the other, the principal. The Professor himself upon another page (46) speaks of the estoppel asserter "having acted upon it by *coming to an agreement* with the agent."

Let me now contrast the conclusions:

1. BOTH DISPUTANTS: "A person is $\frac{\text{always}}{\text{never}}$ bound by his manifested intentions."

2. PROF. COOK: "One may manifest his intention through another person, called an agent."

ESTOPPEL-SINNERS: "Or through a document, called a newspaper, or in other ways too numerous to mention."

3. PROF. COOK: "When by words or acts fairly interpreted, one has represented to another person, or to the world at large, that a certain person is his agent vested with certain authority, he has manifested to such other person, or to the world at large, his intention to be bound by the acts of the agent within the scope of the authority thus represented to exist."

ESTOPPEL-SINNERS: "Possibly he has. If that is all he has done, it won't hurt him. It is the misrepresentation, not the intention, that will probably cause him trouble."

4. BOTH: "Therefore, when the person to whom this $\frac{\text{manifestation of intention}}{\text{misrepresentation of fact}}$ has been made, has acted upon it, by coming to an agreement with the agent, acting within his apparent authority, the principal is bound."

PROF. COOK: "Because a contract has been entered into between himself and a third party."

ESTOPPEL-SINNERS: "Because, although there is no true contract (the agent not having had authority to make one) the principal is, by the assertion of such authority, precluded from denying it."

Observe the data accepted by both disputants: There was a misrepresentation of a fact—a misrepresentation as to the agent's authority; and there was a change of position "by coming to an agreement with the agent." These are the facts, and all we need for the commonest sort of estoppel is that the change of position should have been consequent upon the misrepresentation. This ingredient is supplied by the Professor, who says that the misrepresentation was a manifestation, and that the manifestation was acted upon. Why he hesitates to say that the misrepresentation was acted upon, I am quite unable to say. I wonder if the dupe would be guilty of perjury if he swore that it was the misrepresentation that he relied upon, and that he did not hear or see any manifestation?

In conclusion, then, let me say that Prof. Cook's error seems to lie in forcing a very peculiar meaning, out of a very common assertion, for the purpose of applying to it a very erroneous notion of the importance of intention in the law of contracts.

JOHN S. EWART.

OTTAWA, CANADA.